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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE JOHNSON,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether petitioner's pleas of guilty were involuntary, and not knowingly and intelligently made, so that the convictions upon such pleas violate due process of law, where (a) petitioner was represented by counsel whom the Illinois Appellate Court found was "confused" with respect to a proposed plea agreement, and petitioner relied on counsel's erroneous advice as to the court's position on the proposed plea agreement; and (b) but for the erroneous and confused advice of counsel, petitioner would not have pleaded guilty.

2. Where petitioner's guilty pleas were entered in reliance on advice by defense counsel who was confused as to the proposed plea agreement, are petitioner's constitutional rights to counsel and to due process of law vindicated by a reduction of the sentence, or must petitioner's convictions be vacated, with petitioner given an opportunity to withdraw his pleas of guilty and plead anew?

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Where defendant was represented by counsel whom the Illinois Appellate Court found was "confused" with respect to a proposed plea agreement, due process requires that the convictions entered upon pleas entered pursuant to representation by such counsel be vacated; and the Appellate Court's reduction of the sentence does not cure the constitutional defect, which renders the underlying guilty pleas null and void, because they were not made voluntarily, knowingly and understandingly.

Certiorari should be allowed to vindicate defendant's federally guaranteed rights to counsel and to due process of law, and to address

the issue, what remedy is required where a guilty plea was entered pursuant to representation by counsel who was "confused" as to the terms of a proposed plea agreement. The Appellate Court's Opinion reflects a dangerous misconception that such a plea can support conviction, so long as the sentence be reduced ... 6

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioner, George Johnson (hereafter, defendant), prays that a writ of certiorari issue to review the opinion and judgment of the Appellate Court of Illinois, First Judicial District, affirming his convictions for indecent liberties with a child (one count) and aggravated indecent liberties with a child (three counts) and reducing his concurrent 18-year sentence terms to 15 years.

JUDGMENT AND OPINION BELOW

The [corrected][1] Opinion of the Appellate Court of Illinois, First Judicial District, No. 85-2997, (not yet published), is set out as Appendix A.

JURISDICTIONAL STATEMENT

On January 30, 1987, the Appellate Court of Illinois, First Judicial District, filed its Opinion. (App. A) Defendant's timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied on June 4, 1987. (App. B) On June 25, 1987, the Appellate Court issued corrections to its prior Opinion.

This Petition to review the judgment of a state court of last resort is timely filed within 60 days after denial of Petition for Leave to Appeal. Jurisdiction is invoked under 28 U.S.C. § 1257(3) and Rules 20.1 and 20.4 of this Court.

[1] The Opinion, dated January 30, 1987, was corrected by Order of the Appellate Court dated June 25, 1987. The only matters altered via the corrections are, essentially, grammatical and/or typographical errors. Only the corrected Opinion is set out herein. (App. A)

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of . . . liberty . . . , without due process of law; . . ."

STATEMENT OF THE CASE

Nature of the Case

Defendant entered guilty pleas to a one-count information charging indecent liberties with a child and to two one-count indictments and to one count of a three-count indictment charging aggravated indecent liberties with a child.[2] He was sentenced to concurrent 18-year terms for each offense. The trial court denied defendant's motions to withdraw his pleas. (App. A, p. 1)

On appeal, defendant maintained his guilty pleas were not voluntary and were not knowingly and understanding-

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[2] Indecent liberties, Ill.Rev.Stat. 1983, Chap. 38, sec. 11-4(a)(3); Aggravated indecent liberties with a child, Ill.Rev.Stat. 1983, Chap. 38, sec. 11-4.1(b)(1)(B). There is no issue respecting the State statutes, which are therefore not reproduced in this Petition in the interest of brevity.

ly entered as required by due process of law, in that he relied upon a false and illusory plea agreement. The Appellate Court affirmed, but reduced the sentences to concurrent terms of 15 years. (App. A, p. 9) The Illinois Supreme Court denied leave to appeal. (App. B)[3]

Statement of Facts

The underlying facts of the offenses are not pertinent to the issues presented in this Petition. Specific facts relevant to these issues are set out in the following *Reasons for Granting the Writ.*

Most pertinent to defendant's position is the following statement by the Appellate Court, summarizing what defense counsel advised defendant prior to his contested pleas of guilty:

> "[D]efense counsel assured defendant that the trial court would consider a sentence below 18 years after a hearing in aggravation and mitigation, and that the trial court would be open minded in considering whether a lesser sentence was appropriate after evidence was presented at the sentencing hearing." (App. A, p. 3)

Considering statements made by the trial court, that he was going to sentence defendant to 18 years, (R. 136, 144),[4] the representations made by defense counsel to

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[3] The Appellate Court characterized counsel below as confused with respect to the plea agreement. (App. A, p. 9) In his Petition for Leave to Appeal to the Supreme Court of Illinois, defendant asserted that this confusion on the part of his counsel rendered the pleas void in violation of due process of law. The Supreme Court denied leave to appeal. (App. B)

[4] Here and hereafter, "R." refers to the Record on Appeal in the Appellate Court of Illinois, First Judicial District, which Record includes the Transcript of Proceedings.

defendant—that the court would consider a sentence of less than 18 years—were not true.

Defendant turned down an 18-year offer prior to entering the contested pleas. (App. A, pp. 3, 6-7) (R. 310, 321)

In reducing defendant's sentence while affirming his convictions, the Appellate Court took into account the State's recommendation of 15 years, and stated:

> "The record does reflect an understandable confusion on the part of defendant's counsel on the trial court's meaning that there would be a 'cap' of 18 years." (App. A, p. 9)

Raising the Federal Questions Below

In the trial court (via motion to vacate pleas of guilty),[5] in the Appellate Court, and in the Supreme Court of Illinois, defendant argued, *inter alia,* that his guilty pleas were not voluntarily, knowingly and understandingly entered because his counsel had misadvised him as to the terms of a proposed plea agreement. (See App. A, pp. 6-7) In the Supreme Court of Illinois, based on the Appellate Court's characterization of defense counsel below as "confused," defendant further argued that counsel's "confusion" rendered his pleas involuntary, and that due process required, not merely sentence reduction, but that the convictions based on such pleas be vacated.

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[5] Defendant's written motion to vacate pleas of guilty, (R. 302-05), as amended, (R. 306), was denied. (R. 246) Defendant's supporting Memorandum, (R. 307-18), with affidavit of defense counsel, (R. 319-23), and transcript of proceedings on the motion to vacate (as amended), (see R. 138-40, 146, 166-241), demonstrates that the issues raised in this Petition were presented below.

REASONS FOR GRANTING THE WRIT

Where defendant was represented by counsel whom the Illinois Appellate Court found was "confused" with respect to a proposed plea agreement, due process requires that the convictions entered upon pleas entered pursuant to representation by such counsel be vacated; and the Appellate Court's reduction of the sentence does not cure the constitutional defect, which renders the underlying guilty pleas null and void, because they were not made voluntarily, knowingly and understandingly.

Certiorari should be allowed to vindicate defendant's federally guaranteed rights to counsel and to due process of law, and to address the issue, what remedy is required where a guilty plea was entered pursuant to representation by counsel who was "confused" as to the terms of a proposed plea agreement. The Appellate Court's Opinion reflects a dangerous misconception that such a plea can support conviction, so long as the sentence be reduced.

Unless voluntarily, knowingly and understandingly entered, a plea of guilty violates due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274 (1969). Ineffective representation by counsel can render a plea constitutionally invalid. (See cases and discussion at pp. 8-10, *infra*.)

The pleas of guilty here at issue were not entered voluntarily, knowingly and understandingly, because they were entered on the basis of a crucial misunderstanding on defendant's part as to the possible consequences of his pleas; for while the trial court adamantly refused to consider a sentence of less than 18 years, (R. 136, 144)—and defendant had previously refused an offer to plead guilty in exchange for an 18-year sentence. (App. A, pp.

3, 6-7)[6]—defendant's pleas were entered only after "the *defense counsel assured defendant that the trial court would consider a sentence below 18 years* after a hearing in aggravation and mitigation, and that the trial court would be open minded in considering whether a lesser sentence was appropriate after evidence was presented at the sentencing hearing." (App. A, p. 3; emphasis added.)

However, defense counsel's "assurances" to defendant that the court *would consider* a sentence of less than 18 years—on the basis of which assurances, defendant agreed to plead guilty, though he previously had rejected an offer to plead for 18 years—were false, because, as per the court's candid admissions, the court *never intended to consider* a sentence of less then 18 years. (R. 136, 144) Indeed, in the course of hearing on post-sentencing motions to withdraw the guilty pleas, the trial court stated:

> "[Y]ou [that is, defense counsel] were well aware of the fact that I indicated that I was going to sentence him to eighteen years. . . . I said that if he [a certain psychiatrist] testifies to what you say he is going to testify to in mitigation, and that is on the record, I would go eighteen years on this." (R. 136)

This statement by the court is entirely contradictory to defense counsel's "assurances" to defendant that the court *would consider* a sentence of *less* than 18 years. Similarly, the court stated:

> "[M]y indication was that he would be sentenced to the eighteen years, providing this psychiatrist testifies to what you said he would." (R. 144)

This statement, too, demonstrates that defense counsel's "assurances" to defendant—whereby defendant falsely was

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[6] ". . . defendant rejected the 18-year offer by the trial court." (App. A, p. 3) (R. 310, 321) The pleas at issue were entered thereafter.

led to believe that his guilty pleas subjected him to a sentence of a *maximum* of 18 years with a possibility of a lesser sentence, whereas in fact the trial court already had decided that an 18 year sentence would be imposed, and that he would not consider imposing a lesser sentence—rendered defendant's guilty pleas involuntary.

The Appellate Court determined that defense counsel was "confused":

> "The record does reflect an understandable *confusion on the part of defendant's counsel* on the trial court's meaning that there would be a 'cap' of 18 years." (App. A, p. 9; emphasis added.)

Given such "confusion," (even if understandable), counsel necessarily gave "confused" advice to defendant; and a defendant who has thus been misadvised by confused defense counsel cannot be said to have entered pleas of guilty voluntarily, knowingly and understandingly, within the constraints of due process of law.

The Pleas Entered Upon Defendant's Reliance on Counsel's "Confused" Advice Are Constitutionally Invalid, Where (i) Counsel's Representation Fell Below an Objective Standard of Reasonableness and (ii) Defendant Would Not Have Pleaded Guilty, Had He Been Advised Properly.

In *Hill v. Lockhart*, 474 U.S. ____, 88 L.Ed.2d 203 (1985), this Court held that the two-pronged standard for evaluating claims of ineffective assistance of counsel, as set out in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984), applies to ineffective assistance claims arising out of the plea process. *Hill*, 88 L.Ed.2d at 209. Pursuant to this standard, the defendant must show, not only that counsel's representation fell below an objective standard of reasonableness, but also, prejudice. In the plea context, the prejudice prong requires a showing that, but for counsel's unprofessional errors, defendant would have

pleaded not guilty. *Id.* at 210. *Accord*, applying *Hill*, see *Key v. United States*, 806 F.2d 133, 138-39 (7 Cir. 1986).

In both *Hill* and *Key, supra*, the reviewing courts found that the defendant had failed to meet the "prejudice" prong, having failed to allege or demonstrate that, but for counsel's ineffective advice, he would not have pleaded guilty. In the case at bar, on the other hand, prior to entering the pleas at issue, defendant had *turned down* a plea offer of 18 years. (R. 310, 321; App. A, pp. 3, 6-7) This meets the requirement of the prejudice prong of *Strickland-Hill*, for it shows that defendant's subsequent plea was based on his belief, per counsel's confused and erroneous advice, that the court would consider a sentence of less than 18 years.

Defense counsel's "confusion" as to the terms of the proposed plea agreement—as characterized by the Appellate Court (see App. A, p. 9)—resulted in counsel's misstating the terms of the proposed plea agreement to defendant, (see p. 7, *supra*), which, in turn, renders the pleas involuntary, and not entered knowingly and intelligently. "[A] guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea . . . ." *United States ex rel. Healey v. Cannon*, 553 F.2d 1052, 1056 (7 Cir. 1977).[7] "The assistance of coun-

[7] "Because a plea of guilty absolutely waives the constitutional protections which insulate the accused and stands as a grave admission that the accused has transgressed the law, it accords with due process only if voluntarily and intelligently given. *Machibroda v. United States*, 368 U.S. 487 . . . (1962); *Kercheval v. United States*, 247 U.S. 220 . . . (1927). An intelligent plea is the culmination of a rational decision-making process, in which the accused assesses the numerous factors which bear upon his choice of whether to formally admit his guilt or to put the State to its proof. The plea must represent the informed, self-determined choice of the defendant among practical alternatives. *Von Moltke v. Gillies*,

(Footnote continued on following page)

sel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding." *United States v. Frye*, 738 F.2d 196, 199 (7 Cir. 1984), citing *McMann v. Richardson*, 397 U.S. 759, 770-71, 25 L.Ed.2d 763, 773 (1970). " '[I]f the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice.' " *Mason v. Balcom*, 531 F.2d 717, 724 (5 Cir. 1976), quoting from *Herring v. Estelle*, 491 F.2d 125, 128 (5 Cir. 1974). "The guilty plea cannot have been knowing and voluntary . . . if a defendant does not receive reasonably effective assistance of counsel in connection with the decision to plead guilty, because the plea does not then represent an informed choice." *Scott v. Wainwright*, 698 F.2d 427, 429 (11 Cir. 1983).

Sentence Reduction Does Not "Cure" the Due Process Violation; Defendant Is Entitled To Withdraw His Pleas and Plead Anew.

Applying the foregoing decisional law of constitutional dimension to the circumstances at bar (as outlined at pp. 6-8, *supra*), defendant's pleas are constitutionally invalid in violation of due process of law, and therefore the convictions should be vacated, and defendant should be allowed to withdraw his pleas and plead anew. The doctrinal analysis

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[7] *continued*
332 U.S. 708 . . . (1948); *DeMeerleer v. Michigan*, 329 U.S. 663 . . . (1947). . . . [A] plea is deemed an intelligent determination of the defendant if it is given with the assistance of competent counsel. . . . [A] guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of feasible options. *Hammond v. United States*, 528 F.2d 15 (4 Cir. 1975); *Colson v. Smith*, 438 F.2d 1075 (5 Cir. 1971)." *United States ex rel. Healey v. Cannon*, *supra*, 553 F.2d at 1056.

of *Hill, supra*, and of all the other decisions cited in this Petition, involves the invalidity of the plea of guilty. No valid conviction can rest upon an invalid plea. Clearly, the Appellate Court's attempt to "save" the convictions by simply reducing the sentences, (see App. A, p. 9), must fail, because the invalidity of the guilty pleas *ab initio* renders any conviction entered thereon, equally invalid. The apparent expedient of sentence reduction cannot suffice, where—as here—*defendant has demonstrated that his pleas were entered in reliance upon the erroneous advice of confused counsel as to the terms of the proposed plea agreement.* Nothing short of being allowed to withdraw his pleas and being given the opportunity to plead anew—on the basis of correct, not confused, advice—can vindicate defendant's constitutional rights.

The following language from *Boykin v. Alabama, supra*, leaves no room for doubt that no conviction can stand which is founded on a plea of guilty in violation of due process, for *such a plea is void*:

> " 'A defendant who enters . . . a plea [of guilty] simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 457, 464 . . . (1938). Consequently, if a defendant's plea if not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.' " *Boykin, supra*, 395 U.S. at 244 n.5, 23 L.Ed.2d at 280 n.5, quoting from *McCarthy v. United States*, 394 U.S. 459, 466, 22 L.Ed.2d 418, 425 (1969).

Certiorari should be allowed, not only to relieve defendant of the consequences of his constitutionally invalid pleas of guilty, but also to permit this Court to address the issue, what remedy is required where a guilty plea

was entered on the basis of erroneous advice of confused counsel. The Opinion of the Appellate Court of Illinois, (App. A, p. 9), reflects a dangerous misconception that such a plea can support conviction, so long as the sentence be reduced. This Court should welcome the opportunity to clarify the issue of remedies in the ineffective-counsel-at-plea situation.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed. And, on the merits, defendant's convictions should be vacated, and he should be permitted to withdraw his pleas of guilty and plead anew, because his pleas and the convictions that rest thereon violate due process of law.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois
First Judicial District, Fifth Division
No. 85-2997—Filed January 30, 1987*

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

GEORGE JOHNSON,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable **Nicholas Zagone**, Judge Presiding.

JUSTICE MURRAY delivered the opinion of the court:

Defendant entered guilty pleas to a one-count information charging indecent liberties with a child (Ill. Rev. Stat. 1983, ch. 38, par. 11-4(a)(3)) and to two one-count indictments and to one count of a three-count indictment charging aggravated indecent liberties with a child (Ill. Rev. Stat. 1983, ch. 38, par. 11-4.1(b)(1)(B)). He was sentenced to concurrent 18-year terms for each offense. After defendant's motions to withdraw his pleas or reduce his sentences were denied, defendant has appealed. Defendant contends that the trial court violated Supreme Court Rule 402 (87 Ill. 2d R. 402) by initiating plea bargaining; that he pleaded guilty relying on a false or illusory plea agreement which denied him due process; and that the 18-year sentence was excessive.

* As corrected by Order of June 25, 1987. See fn. 1, p. 2 of foregoing Petition.

In accepting defendant's guilty plea, the trial court advised defendant of his rights at a trial, which he was giving up, in substantial compliance with Supreme Court Rule 402 (87 Ill. 2d R. 402). In addition, defense counsel stated that conferences had been held regarding the case and "that the only agreement that has come out of these conferences is that the sentence that he is liable for would carry a cap of eighteen years." The trial court, in addressing the defendant, reiterated to defendant that upon a plea of guilty there would be a "cap of eighteen years," which the trial court indicated meant that the defendant would "not be sentenced to the penitentiary for a period of more than eighteen years." Defendant indicated that he understood the situation. After entry of the guilty pleas, the case was continued for a hearing in aggravation and mitigation. After that extensive hearing, which will be detailed hereafter, defendant was sentenced to a term of 18 years in the penitentiary.

Thereafter defendant filed a motion to reduce his sentence, which was denied, and a motion to withdraw his guilty pleas, which was also denied. During the hearing to withdraw the guilty pleas, the State indicated that it did not dispute the matters contained in the defense affidavits concerning the conferences on the guilty pleas and therefore no evidentiary hearing was held on the matter. These documents basically indicate that the defense counsel and the prosecution entered into plea discussions. The State offered a term of 15 years' imprisonment in return for defendant's guilty pleas, but apparently defendant did not agree with the recommendation. On March 8, 1985, the parties agreed to present the matter to the trial court. On March 29, 1985, the trial court indicated that it believed that a sentence of 25 years' incarceration was appropriate apparently based on defendant's conviction for a similar offense in which he had received a probationary sentence. The trial court, after further discussion, then indicated that a 20-year term might be imposed. Both proposed dispositions were rejected by defense counsel. Finally, the trial court indicated that it would impose an

18-year term upon a guilty plea on condition that defendant cooperate in publicizing the circumstances of his type of criminal behavior. The court indicated that this offer would be withdrawn in one week. On April 1, 1985, defendant rejected the 18-year offer by the trial court. One day later, defense counsel presented the proposal that upon defendant's plea of guilty to the offenses that a "cap" of 18 years be agreed to as the maximum sentence that might be imposed. In return, the defense counsel assured defendant that the trial court would consider a sentence below 18 years after a hearing in aggravation and mitigation, and that the trial court would be open minded in considering whether a lesser sentence was appropriate after evidence was presented at the sentencing hearing. Defendant agreed to this disposition.

I.

Because the trial court imposed 18-year sentences upon defendant's pleas of guilty, defendant now contends that his guilty pleas were improper because the trial court initiated the guilty plea negotiations in contravention of Supreme Court Rule 402(d)(1). (87 Ill. 2d R. 402(d)(1).) Defendant now maintains that, in this case, the trial court's respective "offers" of 25, 20 and 18 years were well outside the recommendations of the State and the defense. In addition, the trial court imposed a time limit for acceptance of the 18-year offer (April 4, 1985) which alerted the defendant to the practical wisdom of entering guilty pleas rather than pursuing trial. Defendant concedes that he and the prosecution sought out the March-1985 plea conference with the trial court, but relying on *People v. Bennett* (1974), 16 Ill. App. 3d 972, 307 N.E.2d 176, the defendant characterizes the trial court's conduct as an initiation of guilty-plea proceedings which, in this case, violated Rule 402 and induced his involuntary pleas of guilty.

In *People v. Bennett*, the defense and prosecution had agreed that if the defendant would plead guilty to aggravated assault and criminal damage to property, the State

would recommend a fine on the former charge and not seek imposition of a penalty on the latter offense which was described by the prosecution as relatively minor. The negotiated plea did not include any condition that defendant be placed on probation. The trial court, however, indicated that it would only accept defendant's guilty plea and the plea agreement if defendant would also apply for probation. Should the probation report prove favorable to defendant, he would then be fined and be placed on probation. After some discussion, both defense counsel and the prosecution agreed with the trial judge's disposition. Defendant then pleaded guilty, but after a resulting probation hearing was held, probation was denied and defendant was sentenced to a seven-month term of incarceration. In setting aside the conviction and directing that defendant be allowed to reconsider his plea, the appellate court held that the trial judge had substantially modified the plea agreement by interjecting a provision regarding probation which the trial court insisted be a part of the agreement even though both defense counsel and the prosecution indicated that they did not think probation was necessary. The appellate court concluded that such conduct was in violation of Rule 402(d)(1) which provides that the trial court "shall not initiate plea discussions."

We do not believe that *Bennett* is controlling in this situation. In *People v. Robinson* (1974), 17 Ill. App. 3d 310, 308 N.E.2d 88, the appellate court considered the term "initiate" as used in Rule 402 and indicated that it was not the equivalent of a trial court's participation in guilty-plea proceedings. The appellate court expressed a view that not all judicial participation in guilty-plea discussions is improper. The court stated:

> "When a defendant learns that the trial judge has sought on his own initiative to resolve his case without benefit of trial, a defendant may well deduce that the judge has prejudged him to be guilty and that a plea of not guilty would be futile. When, on the other hand, both the State's Attorney and defense counsel seek to reach agreement but are unable to

> do so without the assistance of the judge, any indication of the judge's prejudice from the mere fact of his willingness to assist in [a negotiation] would be negligible." (17 Ill. App. 3d 310, 313-14.)

The court in *Robinson* further indicated that claims that the plea would be involuntary depending on the action of the judge would have to be considered on a case-by-case basis.

In *People v. Barringer* (1974), 22 Ill. App. 3d 168, 317 N.E.2d 331, the appellate court explained its decision in *Bennett* by noting that in *Bennett* the trial court's actions had resulted in a considerable modification of the plea agreement which drastically altered the agreement and also injected the possibility of incarceration where none had previously existed.

In the present case, we do not believe that the trial court can be said to have initiated the guilty-plea discussions. Here, it is agreed that defense counsel and the prosecution had discussed possible sentences for defendant upon entry of guilty pleas. The State had taken a position that it would seek a sentence of 15 years, while defense counsel indicated that defendant believed that a lesser term was appropriate. Because of the disagreement, the matter was presented to the trial court which indicated basically that it did not agree with either position. Rather, based on defendant's record, the trial court indicated that a more substantial sentence was appropriate. Defense counsel, however, rejected the 25-year sentence and later a 20-year sentence which the trial court indicated might be appropriate, and the trial court then proposed an 18-year term if the defendant would cooperate in publicizing his condition apparently in order to benefit others who had similar psychological problems. The trial court then indicated that such term would be acceptable to it only until April 4, 1985. The defendant, however, rejected the 18-year term. We see nothing in this situation which would require a conclusion that the trial court had drastically altered the character of the sentence. The State was proposing a 15-year term and the last indicated sen-

tence by the trial court was a term of 18 years. Certainly defendant was well aware that several of the offenses for which he was pleading guilty were Class X offenses requiring a mandatory prison term of six years' and possibly upward to 30 years' incarceration. Under the circumstances of this case, we do not believe that there can be any conclusion other than the fact that the trial court did not initiate the guilty-plea discussions.

II.

Defendant also complains that he was denied due process when his motion for leave to withdraw his guilty pleas was rejected because such pleas were entered upon a reliance of a false and illusory plea agreement, which the trial court either did not understand or the trial court did not permit defendant to concur in the agreement by allowing him to consider whether he should withdraw the plea. In this regard defendant characterizes the trial court's behavior as ignoring the agreement reached by the parties. Defendant concedes that he suggested a "cap" to the State, the essence of which was that the trial court would limit the range of sentencing from between six to 18 years, and would maintain an open mind to a sentence of less than 18 years upon hearing evidence in aggravation and mitigation at the sentencing hearing. It was also understood that the State would make a recommendation of a 15-year term of incarceration upon entry of the plea. Defendant argues that by pleading guilty he could hope for less than the "cap" and would also benefit by the State's lower recommendation. Defendant in his brief concedes that the trial court was entitled to sentence him to a term of 18 years; however, defendant maintains that the trial court had never had an intention of entertaining a sentence below the 18-year "cap," and in fact, the trial court's agreement to such "cap" was a ruse designed to induce him to plead guilty. Defendant also characterizes the trial court as continuing to view the 18-year sentence as a conditional minimum rather than a maximum sentence; even though the defendant had explicitly rejected

it several days before the offer of an 18-year term. Therefore, defendant concludes that his plea was anything but intelligent and voluntary.

We must reject defendant's position. As noted, just prior to entry of the guilty pleas, defense counsel indicated that defendant understood that the only agreement reached was that the sentence imposed would not exceed 18 years, and that the defendant would be able to argue for a lesser sentence. Defendant concurred in the trial court's similar inquiry before entering the guilty pleas, and indicated that no other promises had been made. At the hearing on defendant's motion to withdraw the pleas, defense counsel concurred that there was an understanding that defendant might possibly be sentenced to a 18-year term, and that defendant was not advised that he would definitely get less than that sentence. Rather defense counsel indicated that he told defendant that the trial court would keep an open mind as to a lesser sentence in tne matter. The State correctly notes that the mere fact that a defendant hopes and believes that he will receive a milder punishment does not present a basis for withdrawal of a guilty plea when that expectation has not been realized. (See *People v. Turner* (1983), 111 Ill. App. 3d 358, 372, 433 N.E.2d 1167.) In the present case the only thing that is presented is defendant's defeated expectation of a lesser sentence than the 18-year term imposed by the trial court. We therefore reject defendant's claim that he was denied due process because we do not perceive that there was a false or illusory plea agreement upon which he relied, or that the trial court in any manner misunderstood the terms of the agreement.

III.

Defendant's final contention is that the 18-year sentence was excessive. This claim is based on his prior record which included only one previous conviction; prior to that time defendant was married and had raised a family, and had generally conducted himself in business in an accept-

able manner. According to the psychiatric testimony presented in defendant's sentencing hearing, defendant was a classic pedophile who was largely passive, exhibitionist, and a voyeuristic fondler. Defendant notes that he had sought psychiatric treatment for his illness for several years, and had engaged in traditional psychotherapy to the extent of institutionalizing himself. Finally, when he became aware of such treatment he subjected himself to treatment with a drug called depoprovera which was a female hormone for which defendant received injections by his psychiatrist. This drug apparently lowered his fantasy level regarding young girls to the extent that he no longer was driven to molest them. The psychiatrist, who testified at defendant's sentencing hearing, indicated that the use of the female hormone had not been subjected to any long lasting study of the effects on individuals such as the defendant. In sentencing the defendant, the trial court indicated that it had a duty to protect young, innocent children. The court recognized that defendant was a sick man, but concluded that based on the evidence no real rehabilitation was possible. Further, the trial court noted that defendant had not promptly sought medical attention.

We initially take notice that, prior to defendant's guilty plea, the statutes classifying the offenses of which defendant was charged, were repealed by Public Act No. 83-1067, effective July 1, 1984. The new Act reclassifying sex offenses is incorporated in sections 12-12 through 12-18 of the Criminal Code of 1961. (Ill. Rev. Stat. 1985, ch. 38, pars. 12-12 *et seq.*) We also note that the new Act changed the offenses, thus affecting their corresponding penalties. Under the new Act, defendant would be subject to lesser penalties. However, the Act specifically provides that it was not intended to affect any prosecution or remedies existing under the statutes in effect at the time of the commission of an offense. That provision is paramount to the general saving statute (Ill. Rev. Stat. 1985, ch. 1, par. 1103), under which a defendant may elect which sentencing scheme a court should apply. See *Peo-*

ple v. Flambeau (1985), 134 Ill. App. 3d 932, 481 N.E.2d 740.

However, even applying the 1983 statute, the 18-year sentence imposed for the conviction of indecent liberties with a child is in error. That offense was a Class I felony with a maximum sentence of 15 years. (Ill. Rev. Stat. 1983, ch. 38, pars. 11-4(d), 1005-8-1(a)(4).) The concurrent sentence of 18 years on the aggravated indecent liberties with a child conviction is within the statutory maximum. That offense was a Class X felony providing for a sentence of not less than six years nor more than 30 years. Ill. Rev. Stat. 1983, ch. 38, pars. 11-4.1(e), 1005-8-1(a)(3).

The record does reflect an understandable confusion on the part of defendant's counsel on the trial court's meaning that there would be a "cap" of 18 years. In light of this confusion and the State's Attorney's recommendation of 15 years, this court modifies the sentence to concurrent terms of 15 years pursuant to Rule 615(2) of the supreme court rules in criminal appeals. 87 Ill. 2d R. 615.

Accordingly, we affirm the convictions but modify the sentences to concurrent terms of 15 years.

AFFIRMED AS MODIFIED.

LORENZ and PINCHAM, JJ., concur.

APPENDIX B

Order of the Supreme Court of Illinois Denying Leave to Appeal

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

June 4, 1987

Mr. Dennis M. Doherty
Attorney at Law
35 E. Wacker Dr., S#3500
Chicago, IL 60601

No. 64926—People State of Illinois, respondent, v. George Johnson, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1987.

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-193

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEORGE JOHNSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's due process rights were violated where the trial court specifically found his guilty pleas to be freely and voluntarily made, he was sentenced within the agreed upon range and the Illinois Appellate Court affirmed the convictions and reduced the sentences.

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IN THE
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GEORGE JOHNSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

OPINION BELOW

The Petitioner pleaded guilty to three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child before Judge Nicholas Zagone of the Circuit Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the convictions but reduced the sentences. (No. 85-2997, January 30, 1987,

corrected June 25, 1987). See Petitioner's Appendix A. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on June 4, 1987. See Petitioner's Appendix B.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257. However, as treated more fully below, respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. ... No State shall ... deprive any person of ... liberty ..., without due process of law;..."

STATEMENT OF FACTS

George Johnson, Petitioner, was charged with five counts of aggravated indecent liberties with a child and one count of indecent liberties with a child in three indictments and one information in the Circuit Court of Cook County, Illinois. The charges arose out of sexual acts that Petitioner Johnson performed on four young girls while baby-sitting.

Prior to Petitioner's pleas of guilty in these cases extensive plea negotiations took place. The People offered Petitioner a fifteen year sentence in exchange for his guilty pleas. This offer was rejected. Thereafter, the trial court, with Petitioner's concurrence, was asked to participate in the negotiations.

The trial court indicated that the People's fifteen year recommendation was not a sufficient penalty. Instead, the trial court stated he would give Petitioner a twenty-five year sentence in exchange for his guilty plea. When defense counsel rejected this sentence, the court offered twenty years. Again, defense counsel rejected the proposal. Finally, the trial court made an offer of eighteen years. No agreement was reached.

Subsequently, an agreement was reached whereby the trial court agreed to a "cap" of eighteen years in exchange for Petitioner's guilty pleas to three counts of aggravated indecent liberties with a child and one count of indecent liberties with a child. Petitioner was thoroughly admonished by the trial court as to his constitutional rights prior to his guilty plea.

Specifically, Petitioner was told that each of the Class X offenses carried a possible penitentiary sentence of between six and thirty years. Further, he was told that pursuant to the negotiations he would not be sentenced to the penitentiary for a period of more than eighteen years.

A hearing in aggravation and mitigation was held wherein defense counsel presented testimony of Petitioner's psychiatrist, Petitioner's son, Petitioner's mother and Petitioner. Defense counsel asked the court for six, seven or eight years and stated that he was "willing to bargain all the way up." The People, after acknowledging the prior recommendation of fifteen years, asked for a sentence "within the upper range of that range the Court has indicated it's considering." The trial court sentenced Petitioner to eighteen years imprisonment.

Subsequently, Petitioner filed a motion to withdraw his guilty pleas, alleging that his pleas were "entered unintelligently and involuntarily in that he was misled into relying upon a false and illusory plea agreement." At the hearing on the motion defense counsel stated that he understood that there was a possibility that Petititoner would receive an eighteen year sentence. Defense counsel told Petitioner he could receive an eighteen year sentence. Additionally, Petitioner was not told that he would definitely get less than eighteen years. The trial court denied the motion.

Petitioner appealed his convictions to the Appellate Court of Illinois, First Judicial District. Petitioner alleged that the trial court violated Illinois Supreme Court Rule 402 (governing plea negotiations), that his due process rights were violated

when his motion to withdraw his guilty plea was denied and that his sentence was excessive.

The Illinois Appellate Court rejected Petitioner's claim that his due process rights had been violated. The Court affirmed the convictions but reduced the sentences from eighteen to fifteen years. The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal. Petitioner now petitions this Honorable Court for a Writ of Certiorari.

REASON FOR DENYING THE WRIT

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHERE THE TRIAL COURT SPECIFICALLY FOUND HIS GUILTY PLEAS TO BE FREELY AND VOLUNTARILY MADE, HE WAS SENTENCED WITHIN THE AGREED UPON RANGE AND THE ILLINOIS APPELLATE COURT AFFIRMED THE CONVICTIONS AND REDUCED THE SENTENCES.

Petitioner George Johnson petitions this Honorable Court for a Writ of Certiorari to the Appellate Court of Illinois and alleges that his Fourteenth Amendment right to due process and his Sixth Amendment right of assistance of counsel were violated relative to his guilty pleas. The People maintain that the petition should be denied based on the fact that the grounds raised by petitioner do no form a sufficient basis upon which to grant a Writ of Certiorari.

It is well established that for a guilty plea to be constitutionally valid, the record must affirmatively show that the plea was intelligent and voluntary. People v. McCoy, 74 Ill. 2d 398, 385 N.E.2d 696 (1979). Further, to implement this constitutional requirement, the Illinois trial courts must substantially comply with Illinois Supreme Court rule 402. Id., 385 N.E.2d at 698. (See Appendix A) Additionally, the courts of review in Illinois have held that generally, substantial compliance with Supreme Court Rule 402 indicates that the plea was intelligent and voluntary. People v. Turner, 111 Ill. App. 3d 358, 443 N.E.2d 1167 (2nd Dist. 1983).

In the present case the trial court specifically found that Petitioner's pleas were entered freely and voluntarily. Additionally, the Illinois Appellate Court

specifically rejected Petitioner's argument that his plea was not intelligent or voluntarily given. Petitioner was specifically admonished by the trial court that he would not be sentenced to more than eighteen years imprisonment. Petitioner, in fact, received an eighteen year sentence. The People maintain that Petitioner was properly sentenced within the agreed upon range. The record clearly reflects that the only agreement reached was that Petitioner's sentence would not exceed eighteen years. Clearly, no promises were made that could be viewed an indicating a guarantee of a lesser sentence.

Petitioner attempted to withdraw his guilty plea. The People maintain that the trial court properly denied this motion. The principles of Illinois law governing the withdrawal of a guilty plea are well settled.

A defendant has no absolute right to withdraw his plea of guilty, rather, he bears the burden of demonstrating to the trial court the necessity of withdrawing his guilty plea. People v. Smithey, 120 Ill. App. 3d 26, 458 N.E.2d 87 (2nd Dist. 1983). Further, the Illinois Supreme Court has specifically stated that allowing the withdrawal of a guilty plea is a matter for the trial court's discretion. People v. Hale, 82 Ill. 2d 172, 396 N.E.2d 317 (1980). Further, the trial court's discretion will not be disturbed on review unless such discretion is abused. People v. Dumas, 50 Ill. App. 3d 637, 365 N.E.2d 1320 (4th Dist. 1977). Finally, "the burden is on defendant to establish the fact of misunderstanding or the fact of misrepresentation to him by counsel or others or that the ends of justice require withdrawal of the plea." Id., 365 N.E.2d at 1332.

Petitioner currently argues that he was denied effective assistance of counsel based on trial counsel's representation relative to his guilty pleas. The People respectfully maintain that neither the facts nor the law warrant this Court's attention to this allegation. As Petitioner correctly asserts, this Court in Hill v. Lockhart, 474 U.S. ___, 88 L. Ed.2d 203, 105 S. Ct. ___ (1985), did hold that the two-pronged standard for evaluating claims of ineffective assistance of counsel, as set out in Strickland v Washington, 466 U.S. 668, 80 L. Ed.2d 674 (1984), does apply to guilty pleas. Hill, 88 L. Ed.2d at 210. A defendant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. Id., 88 L.

Ed.2d at 209. This Court also stated that where "a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Id., 80 L. Ed.2d at 208.

The facts in this case clearly fail to establish that trial counsel's advice fell below that required by Strickland. At the motion to withdraw the plea counsel stated that he understood that there was a possibility that defendant would receive an eighteen year sentence. Additionally, defense counsel stated that he did not guarantee defendant that he would definitely get less than eighteen years if he pleaded guilty. The law in Illinois clearly states that the requirement that a plea of guilty be

understandably and voluntarily made does not require that the defendant know in advance what sentence will be imposed. People v. Jones, 135 Ill. App. 3d 1023, 482 N.E.2d 1031 (1st Dit. 1985). Further, "a guilty plea made in reliance upon advice of counsel estimating a sentence to be expected is a voluntary plea." Id., 482 N.E.2d at 1038. Additionally, "the mere belief or hope of a defendant that he will get a shorter sentence by pleading guilty does not permit him to withdraw his plea when that expectation is disappointed." Id., 482 N.E.2d at 1038.

Petitioner further contends that this Court should grant his Writ in order to "clarify the issue of remedies in the ineffective-counsel-at-plea situation." He contends that the Appellate Court erred in reducing his sentences from eighteen to fifteen years. The People maintain that,

although there was no need to do so, the Appellate Court reduced Petitioner's sentence pursuant to Illinois Supreme Rule 615(b)(4) which states:

> (b) Powers of the Reviewing Court.
>
> On appeal the reviewing court may:
>
> (4) reduce the punishment imposed by the trial court;

However, in the light of the fact that there was no ineffective assistance of counsel in this case, this Court need not review the reduction of Petitioner's sentence. For, although the People maintain that Petitioner's sentence did not require reduction, the People did not petition the Illinois Supreme Court for leave to appeal this ruling.

As Petitioner has failed to raise any important constitutional issue or present any grounds which would justify the consumption of this Court's valuable time, the instant Petition for Writ of Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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A P P E N D I X

APPENDIX A

Illinois Supreme Court Rule 402:

402. (Supreme Court Rule 402). Pleas of Guilty

In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the

defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) **Determining Whether the Plea is Voluntary.** The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is

the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea aggreement, were used to obtain the plea.

(c) **Determining Factual Basis for Plea.** The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

(d) **Plea Discussions and Agreements.** When there is a plea discussion or plea agreement, the

following provisions, in addition to the preceding paragraphs of this rule, shall apply:

(1) The trial judge shall not initiate plea discussions.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may

also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant

thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

(3) If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement is stated

as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement.

(e) Transcript. In cases in which the defendant is charged with a crime punishable by imprisonment in the penitentiary, the proceedings required by this rule to be in open court shall be taken verbatim, and upon order of the trial court transcribed, filed and made a part of the common law record.

(f) **Plea Discussions, Plea Agreements, Pleas of Guilty Inadmissible Under Certain Circumstances.** If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding.

Amended eff. Feb. 1, 1981.